UNITED STATES BANKRUPTCY COURT

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NORTHERN DISTRICT OF CALIFORNIA

In re	No. 03-44829 TT Chapter 7
RALBERT RALLINGTON BROOKS-HAMILTON, Debtor. _____/	
RALBERT RALLINGTON BROOKS-HAMILTON, Plaintiff, vs. THE CITY OF OAKLAND, Defendant. _____/	A.P. No. 03-4837

MEMORANDUM OF DECISION RE MOTION FOR RULE 9011 SANCTIONS

In the above-captioned adversary proceeding (the "Adversary Proceeding"), Defendant The City of Oakland (the "City") seeks sanctions against the Debtor and his attorney David Smyth ("Smyth") pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure ("Rule 9011"). For the reasons stated below, the motion is granted in part and denied in part.

SUMMARY OF FACTS

Sometime prior to 1996, the federal government established a program (the "EEC Program") designed to encourage business development in urban areas identified as economically depressed (the "enterprise zones"). Funds were advanced by the United States

Department of Housing and Urban Development ("HUD") to local governments to enable them to provide loans to individuals who submitted proposals for qualifying projects ("flagship projects") for businesses in enterprise zones. Portions of Oakland were identified as enterprise zones. The Debtor submitted a proposal that was accepted by the City as a flagship project: i.e., for the manufacture and sale of collapsible utility carts (the "Business Personal Property").

Between 1996 and 1998, the City loaned a total of $500,000 to the Debtor pursuant to the EEC Program. To secure his obligation to repay these loans, the Debtor executed three deeds of trust (the "Deeds of Trust") encumbering his home and warehouse (the "Debtor's Real Property") and a UCC-1 financing statement with respect to is inventory and equipment (the "Debtor's Business Personal Property"). The documents were duly recorded and filed.

The Debtor defaulted on his loan payments almost immediately. The City states that he only made two payments. The Debtor concedes that the last payment he made was in 1996. In January 2001, the City filed a complaint against the Debtor in state court, seeking to take possession of Debtor's Business Personal Property, to inspect the warehouse, and for damages (the "State Court Complaint"). Simultaneously, the City commenced nonjudicial foreclosure proceedings against the Debtor's Real Property. Since that time, the Debtor has prevented foreclosure through a series of legal actions.

On March 27, 2001, the Debtor filed a petition seeking relief under chapter 13 of the Bankruptcy Code. No plan was confirmed in that case. On November 16, 2001, the bankruptcy court granted the City's motion for relief from the automatic stay. The Debtor voluntarily dismissed the chapter 13 case on December 17, 2001.

On November 29, 2001, the Debtor filed a complaint against the City in federal district court (the "District Court Complaint"). On January 30, 2002, the district court granted the Debtor's application for a preliminary injunction, enjoining the foreclosure sale of the Debtor's Real Property. On May 28, 2002, after permitting the Debtor to amend his complaint twice, the district court dismissed the District Court Complaint for lack of subject matter jurisdiction and dissolved the injunction of the foreclosure sale.

In its dismissal order, the district court noted that the Debtor contended that it had subject matter jurisdiction over the Debtor's state law tort claims because they alleged that the City had violated a federal statute: i.e., the HUD statute governing the EEC Program. The district court held that this contention would be correct if the HUD statute created a private right of action, express or implied. It held that the HUD statute did not do so.

In July 2002, the City applied for a writ of possession with respect to the Debtor's Business Personal Property. The state court signed an order authorizing the issuance of a writ, and a writ was issued on July 22, 2002 (the "Writ"). However, the City never enforced the Writ by taking possession of the Debtor's Business Personal Property.

Thereafter, on August 14, 2002, the Debtor filed a cross-complaint in the State Court Action (the "State Court Cross-Complaint"). The State Court Cross-Complaint alleged six causes of action, including a cause of action for breach of contract. The City filed a demurrer which was sustained with leave to amend. The Debtor then filed a first amended cross-complaint (the "First Amended State Court Cross-Complaint"), alleging eight causes of action. The City filed another demurrer. This demurrer was sustained without leave to amend as to all but two causes of action. It was sustained with leave to amend the breach of contract claim and a claim for race discrimination. It was at this point that Smyth began representing the Debtor.

On or about January 17, 2003, the Debtor filed a second amended cross-complaint (the "Second Amended State Court Cross-Complaint"), alleging amended causes of action for breach of contract and race discrimination. The City filed another demurrer which, on May 16, 2003, was sustained as to both of the remaining causes of action without leave to amend for failure to state a claim.

On August 21, 2003, the Debtor filed this bankruptcy case. Smyth appeared in the case as the Debtor's attorney of record. The Debtor filed Schedules of Assets and Liabilities (the "Schedules"), listing the City as a secured creditor holding an undisputed secured claim, albeit for substantially less than the City claims to be owed. The Debtor also filed a plan (the "Plan"). The Plan provided that the City's claim would be paid by April 1, 2004 through a sale or refinance of the Debtor's Real Property. The Schedules did not list

any claims against the City as an asset of the Debtor. The City did not object to the Plan, and the Plan was confirmed on September 9, 2003.

On December 5, 2003, the Debtor filed a complaint seeking declaratory relief against the City (the "Bankruptcy Court Complaint"). Smyth signed the Bankruptcy Court Complaint as the Debtor's attorney of record. The principal allegations of the Bankruptcy Court Complaint were that: (1) the City improperly and illegally required the Debtor to execute the Deeds of Trust and other liens[1] on his property in violation of HUD guidelines (the "Statutory Violation Claim"), (2) the City breached its contract with the Debtor by failing to disburse all the loan and grant money promised (the "Breach of Contract Claim"), and (3) the City lost its security interests and extinguished its debt by obtaining the order authorizing the issuance of a writ of possession (the "One Action Claim"). The prayer of the Bankruptcy Court Complaint seeks a declaration that all of the City's liens on the Debtor's property are void and that the Debtor owes the City no money.

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[1]The Statutory Violation Claim referred to four additional liens (the "Interim Loan Liens") that were recorded on the Debtor's Real Property in the spring of 1998 and seeks a declaration that these liens are also void as in violation of the HUD statute. The Court is not sure why these liens have not been released. It believes that the debts they secured were repaid from the loan proceeds of the last loan made to the Debtor by the City. However, the City is correct that the only allegation in the Bankruptcy Court Complaint regarding these liens is that they were illegal and are void because they violated the HUD statute. These allegations are clearly part and parcel of the Statutory Violation Claim.

On February 13, 2004, the City filed a motion to dismiss the Bankruptcy Court Complaint. The motion was heard on March 18, 2004. In the motion, the City contended that the claims asserted in the Bankruptcy Court Complaint were barred by the doctrines of res judicata and collateral estoppel. Having concluded at that point that the case would either be dismissed or converted to chapter 7 in the near future, the Court abstained from addressing these legal issues and dismissed the Bankruptcy Court Complaint on that basis.

On March 22, 2004, the Court issued an order to show cause why the case should not be dismissed and why Smyth should not be sanctioned for violating Rule 9011, primarily based on frivolous contentions made in an objection to the City's proof of claim. On March 26, 2004, the City filed a motion for Rule 9011 sanctions against the Debtor and Smyth in the Adversary Proceeding. The City also filed a request that the case be converted to chapter 7 rather than dismissed.

The order to show cause was heard on May 5, 2004. At the hearing, the Court ordered the case converted to chapter 7. It continued the hearing on the City's motion for sanctions and on its own order to show cause re sanctions to July 7, 2004. At the conclusion of the July 7, 2004 hearing, the Court took both matters under submission. The Court's ruling on its own order to show cause is set forth in a separate memorandum, filed in the main case (the "Main Case Memorandum").

DISCUSSION

A. LAW APPLICABLE TO RULE 9011 MOTIONS

Rule 9011(a) provides, in pertinent part, that "[e]very petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name." Rule 9011(b) provides further that, by "presenting" a pleading or other paper to the court, the attorney certifies to the court: (1) that the paper "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in expense" and (2) that "the claims, defense, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law...."

Rule 9011(c) permits the court to impose an appropriate sanction if, after notice and a reasonable opportunity to respond, the court determines that Rule 9011(b) has been violated. Rule 9011(d) permits a party in interest to seek Rule 9011 sanctions by a separate motion after first giving the party 21 days notice and opportunity to withdraw the offending paper.[2] The sanctions imposed must be limited to what is sufficient to deter repetition of the conduct giving rise to the sanctions.

If a party is represented by an attorney, only the attorney, not the party, may be subjected to sanctions for asserting a claim or

[2]The City complied with this requirement. The Bankruptcy Court Complaint was not withdrawn.

defense. However, either the attorney or the party (or both) may be sanctioned for asserting a claim or defense for an improper purpose: i.e., to harass, delay, or needlessly increase the expense of litigation. Fed. Bankr. Proc. Rule 9011(c)(2)(A). Whether the claim or defense was asserted for an improper purpose is judged by an objective standard: i.e., by what a reasonable attorney or party would have done. Bus. Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 809-12 (9th Cir. 1989), aff'd, 498 U.S. 533 (1991).

Rule 9011 sanctions are only appropriate if the claims asserted are utterly lacking in support. O'Brien v. Alexander, 101 F.3d at 1489 (2nd Cir. 1996). They should not be imposed simply because the party asserting the claims did not prevail. CJC Holdings, Inc. v. Wright & Lato, Inc., 989 F.2d 791, 793 (5th 1993). Rule 9011 "'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.'" Operating Engineers Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988)(quoting from Notes of Advisory Committee on Rules, Federal Civil Judicial Procedure and Rules 34 (West 1987).

B. ARGUMENT

The City contended that, by filing the Bankruptcy Court Complaint, Smyth violated Rule 9011(b)(2) and both the Debtor and Smyth violated both Rule 9011(b)(1). The Court agrees that the claims alleged in the Bankruptcy Court Complaint were frivolous. All three claims asserted in the Bankruptcy Court Complaint--i.e., the Statutory Violation Claim, the Breach of Contract Claim, and the One

Action Claim--were clearly barred by either collateral estoppel or res judicata. It also finds the One Action Rule Claim to be clearly substantively frivolous. Therefore, the Court concludes that Smyth should be sanctioned under Rule 9011(b)(2).

The Court also concludes that, from an objective standpoint, Smyth filed these claims for an improper purpose and that Rule 9011(b)(1) provides an additional basis sanctioning him. However, judged objectively, the Court does not concludes that the Debtor filed these claims for an improper purpose. Collateral estoppel, res judicata, and the one action rule are all technical in nature. The Debtor has never gone to trial on any of his claims. A reasonable nonattorney, without adequate counsel, might well believe that, under these circumstances, he was free to keep asserting them. A reasonable nonattorney cannot be expected to understand the proper application of the one action rule.[3] The basis for the Court's conclusions is set forth below.

Smyth made four arguments in opposition to the City's motion for sanctions. First, he contended that, because the Court abstained rather than ruling on the City's contention that the claims asserted

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[3]The Debtor seemed sincere in his belief that he has been wronged by the City and the EEC Program. He applied for a loan of $1 million. He was approved for a loan of only $400,000. Moreover, $250,000 of this loan was delayed for 18 months through no fault of the Debtor. This may have caused or at least contributed to the failure of the Debtor's business. However, the Debtor agreed to accept a loan of a lesser amount and to take the proceeds in increments. He had no guarantee concerning when the second increment would be received. Moreover, regardless of how fault is attributed, the Debtor has no remedy against the City under existing law.

in the Bankruptcy Court Complaint were barred by res judicata and collateral estoppel, the Court may not impose sanctions for filing the Bankruptcy Court Complaint under Rule 9011(b). Second, he asserted that the claims asserted in the Bankruptcy Court Complaint were not barred by res judicata or collateral estoppel. Third, he argued that the claims were not asserted for an improper purpose. Fourth, he contended that the monetary sanction requested by the City is excessive.[4] The Court will address each argument in turn.

1. Effect of Abstention on Motion for Rule 9011 Sanctions

As noted above, Smyth contended that, because the Court merely abstained, rather than ruling on the legal issues raised by the City in its motion to dismiss, the Court may not or should not impose Rule 9011 sanctions on either the Debtor or Smyth.[5] The City disagreed. It argued that, by abstaining, the Court did not immunize the Debtor and Smyth from Rule 9011 liability. The Court merely placed the issues back where they belong, in state court.

While the Court agrees with the City that, by abstaining, it did not immunize Smyth or the Debtor from sanctions, Smyth's first argument does raise an important point. A party may not be sanctioned under Rule 9011(b) simply because its claim or defense

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[4]The City has requested that the Debtor and/or Smyth be compelled to pay the $10,671 in attorneys' fees and costs it has incurred in connection with this adversary proceeding (the "Adversary Proceeding").

[5]The only authority cited by the Debtor for this proposition is Jureczki v. City of Seabrook, Tex., 668 F.2d 851 (5th Cir. 1982). However, the only relevant statement made in Jureczki is that, when a court abstains, it does not reach the merits of the underlying issues. Jureczki, 668 F.2d at 853.

does not prevail. However, the converse is not true. If all of a party's claims or defenses have merit, sanctions may not be imposed, even under Rule 9011(b)(1). Townsend v. Holman Consulting Corp., 929 F2d 1358, 1363 (9th Cir. 1991). Thus, the Court must determine whether the claims asserted in the Bankruptcy Court Complaint had merit. The Court can make this determination now. It need not have done so in connection with the motion to dismiss.

2. Were Claims Asserted in Bankruptcy Court Complaint Both Meritless and Frivolous?

The Court concludes that the claims asserted in the Bankruptcy Court Complaint were barred by either res judicata or collateral estoppel. It also concludes that this would have become obvious if Smyth had done a reasonable amount of legal research before filing the Bankruptcy Court Complaint. Smyth did not file the Bankruptcy Court Complaint quickly, to meet a deadline, without time for conducting such research. For that reason, the Court concludes that the claims were both meritless and frivolous. The Court also concludes that the One Action Rule Claim was substantively meritless and frivolous. The reasons for the Court's conclusions are set forth below.

a. Elements of Res Judicata and Collateral Estoppel

Res judicata and collateral estoppel are related but discrete doctrines. Res judicata, otherwise known as claim preclusion, has four necessary elements: (1) the parties must be identical; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been a final judgment on the

merits; and (4) the same cause of action must be involved in both cases. In re Heritage Hotel Partnership I, 160 B.R. 374, 376 (Bankr. 9th Cir. 1993).

Most of the required elements of collateral estoppel, or issue preclusion, are the same as those of res judicata: i.e., (1) there must have been a fair and full opportunity to litigate the issue in the prior proceeding, (2) the issue must have been lost by a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted must have been a party (or in privity with a party) to the prior action. However, collateral estoppel applies only if the issue in question was actually litigated in the prior proceeding. Rein v. Providian Financial Corp., 252 F.3d 1095, 1099 (9th Cir. 2001).

b. Statutory Violation Claim

As set forth above, the District Court Complaint was dismissed for lack of subject matter jurisdiction. In general, the dismissal of an action for lack of subject matter jurisdiction is not a judgment on the merits and thus does not have either collateral estoppel or res judicata effect. There is an exception to this rule. Such a dismissal does have collateral estoppel effect with respect to the issue upon which the dismissal was based. See Okoro v. Bohman, 164 F.3d 1059, 1062-63 (7th Cir. 1999). As stated in Okoro, the paradox that a court without subject matter jurisdiction can issue a decision with preclusive effect is "superficial" since a court always has jurisdiction to determine its own jurisdiction. Id. 164 F.3 at 1063.

The District Court Complaint was dismissed for lack of subject matter jurisdiction because the district court determined that the Debtor had no private right of action against the City under the HUD regulations and statute governing the EEC Program. The Debtor is collaterally estopped from relitigating that issue here.

Smyth conceded that the Debtor was collaterally estopped by the district court's ruling from seeking damages against the City based on the Statutory Violation Claim. However, he contended that the Debtor was not collaterally estopped from seeking declaratory relief. In support of this contention, he cited Mycogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 898 (2002) and Gilliam v. American Case Co of Reading Pennsylvania, 735 F. Supp. 345, 348 (N.D.Cal. 1990); Aerojet-General Corp. v. American Express Ins. Co., 97 Cal. App. 4th 387, 391 (2002).

None of these cases supports Smyth's contention. Mycogen Corp. and Gilliam both involved res judicata, not collateral estoppel. Aerojet-General Corp. held that, under the circumstances presented, a prior declaratory relief action did bar the prosecution of a second declaratory relief action, despite the plaintiff's attempt to distinguish the claims asserted in the two actions. The Court concludes that it was frivolous for the Statutory Violation Claim to be asserted in the Bankruptcy Court Complaint regardless of the nature of the prayer.

c. Breach of Contract and One Action Rule Claims

As noted above, after the District Court Complaint was dismissed, on August 14, 2002, the Debtor filed the State Court

Cross-Complaint. Initially, the State Court Action alleged six causes of action, including a breach of contract claim. All of the causes of action were based on the City's loans to the Debtor pursuant to the EEC Program. After giving the Debtor several opportunities to amend his causes of action, all of the Debtor's causes of action, including the breach of contract claim, were dismissed without leave to amend. The City contended that the dismissal of these claims, in particular, the breach of contract claim, barred the Breach of Contract and One Action Rule Claims asserted by the Debtor in the Bankruptcy Court Complaint as a matter of res judicata. The Court agrees.

A federal court will give a state court judgment the same preclusive effect it would be given by another state court. In re Mantz, 343 F.3d 1207, 1214 (9th Cir. 2003). Under California law, res judicata bars relitigation of any cause of action previously determined. The bar is not limited to those issues actually litigated in the prior action; it includes any issues that could have been litigated. Pitzen v. Superior Court, 16 Cal. Rptr. 3d 628, 632 (2004).

As discussed above, the elements of res judicata are: (1) the claim raised in the present action must be the same as the claim litigated in the prior proceeding, (2) the prior proceeding must have resulted in a final judgment on the merits, and (3) the party against whom the doctrine is being asserted must have been a party (or in privity with a party) to the prior proceeding. Pitzen, 16 Cal. Rptr. 3d at 633.

Clearly, the Debtor was a party to the State Court Action. Thus, the only questions concerning the application of res judicata to bar the Debtor's assertion of the Breach of Contract and One Action Rule Claims are whether they are part of the same cause of action asserted in the Second Amended State Court Cross-Complaint and whether the order sustaining the City's demurrer to the breach of contract cause of action in the Second Amended Cross-Complaint without leave to amend was a judgment on the merits.

Smyth contended that the Breach of Contract Claim and the One Action Rule Claim contained in the Bankruptcy Court Complaint was at least in part a different cause of action than the breach of contract action set forth in the Second Amended State Court Cross-Complaint. He also asserted that the order sustaining the demurrer to the Second Amended Cross-Complaint was not a judgment on the merits. The Court will address the latter contention first.

Under California law, an order sustaining a demurrer without leave to amend is considered a judgment on the merits, with res judicata effect, as long as the order was based on the merits (or lack thereof) of the claims asserted and not on some formal defect. See Goddard v. Security Ins. And Guar. Co., 14 Cal. 2d 47, 52 (1939); Pollock v. University of Southern California, 112 Cal. App. 4th 1416 (2003). Smyth contended that the order sustaining the demurrer to the breach of contract cause of action alleged in the Second Amended Cross-Complaint was based on statute of limitations. Thus, the cause of action may still be asserted as a defense to the City's claim.

See Styne v. Stevens, 26 Cal. 4th 42, 51-52 (2001); Cal. Civ. Proc. Code § 431.70.

The Court disagrees. The order sustaining the demurrer to the Second Amended State Court Cross-Complaint stated that the breach of contract claim was dismissed for failure to state a claim, not because the claim was barred by the statute of limitations. This order qualifies as a judgment on the merits.

Smyth's other contention relied on the fact that two of the issues raised in the Bankruptcy Court Complaint were not mentioned in the Second Amended State Court Cross-Complaint: i.e., the claim that the Interim Loan Liens were also recorded in violation of the HUD statute and the One Action Rule Claim. This argument is both meritless and frivolous.

California applies the "primary right" theory to define a cause of action. If the allegations in the subsequent action are within the scope of the prior action, related to the same subject matter, and are relevant to the issues presented in the prior action, so that they could have been raised, a final judgment bars their being litigated in the subsequent action. Nicholson v. Fazeli, 113 Cal. App. 4th 1091, 1100 (2003). The reason for this is to prevent a party, through negligence or design, from withholding issues and litigating them in consecutive actions. Amin v. Khazindar, 112 Cal. App. 4th 582, 582 (2004).

Smyth contended that res judicata should not bar the assertion of the claims with respect to the Interim Loan Liens because the Debtor did not even realize they were encumbering his real property

until he obtained a preliminary title report after filing this bankruptcy case. This argument is clearly insufficient. The Interim Loan Liens were a matter of public record. Presumably, they were deeds of trust executed by the Debtor. As noted above, res judicata prevents the later assertion of claims asserted through negligence.

Smyth also contended that the One Action Rule Claim was not part of the same cause of action as the breach of contract claim alleged in the Second Amended State Court Cross-Complaint because the events giving rise to the claim did not occur until after the State Court Complaint was filed. This contention is frivolous. Although the City did not obtain the order authorizing the issuance of the Writ until after the State Court Complaint was filed, the order was obtained before the original State Court Cross-Complaint was filed, alleging the Debtor's breach of contract cause of action against the City. Thus, this claim could have been asserted in the State Court Cross Complaint as part of the breach of contract claim.

The Court concludes that the Breach of Contract Claim, including both the claims related to the Interim Loan Liens and the One Action Rule Claim, were part of the same cause of action as the breach of contract claim that was dismissed without leave to amend. Thus, they are barred by res judicata. The Court believes that this should have been obvious. Thus, it was frivolous of Smyth to assert these claims in the Bankruptcy Court Complaint.[6]

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[6]The City also contended that all three claims asserted in the Bankruptcy Court Complaint were barred by the res judicata effect of the order confirming the Debtor's chapter 13 plan because the Debtor's intention to assert them was not disclosed prior to

d. One Action Rule Claim Was Substantively Frivolous

The Court also finds the One Action Rule Claim to be substantively frivolous. In the Bankruptcy Court Complaint, Smyth alleged that, by obtaining an order authorizing the issuance of a writ of possession, the City lost its security interest in the Debtor's Real Property and extinguished its debt. He did not allege in the Bankruptcy Court Complaint that either the order or the Writ was ever served on the Debtor.[7]

The one action rule is set forth in Section 726(a) of the California Code of Civil Procedure. In essence, it provides that, by obtaining a judgment (or taking some other comparable action) on a claim secured by real property, other than a judgment for judicial foreclosure, the creditor loses its security interest. See Cal. Civ. Proc. Code § 726(a); Walker v. Community Bank, 10 Cal. 3rd 729 (1974). Actions other than obtaining a judgment that have been held to invoke this rule are obtaining a lien on the debtor's unpledged collateral

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confirmation. The Court disagrees. The authority cited by the City is distinguishable. Two of the decisions involve chapter 11 cases, where the procedure and substantive law is substantially different than in chapter 13. See In re Heritage Hotel Partnership I, 160 B.R. 374 (Bankr. 9th Cir. 1993) and In re Kelley, 199 B.R. 698 (Bankr. 9th Cir. 1996). Moreover, the Court agrees with Smyth that such a rule would be untenable where, as here, a creditor is not even required to file its proof of claim before confirmation.

[7]In papers filed in connection with this order to show cause, Smyth contended alternately that the Debtor was served with the order authorizing the issuance of a writ of possession or with the writ. He conceded that the City never levied the Writ by having a levying officer seize the Debtor's Business Personal Property removed from his warehouse. To the contrary, the Debtor asserted that the City owed him storage fees in an amount approximately equal to the amount of the City's claim.

through a pre-judgment writ of attachment and exercising a banker's right of offset against the debtor's deposit account. See Shin v. Superior Court (Korea First Bank), 26 Cal. App. 542, 549-54 (1994)(pre-judgment attachment) on real property not subject to its security interest); Bank of America v. Daily, 152 Cal. App. 3d 767, 771-74 (1984)(offset against debtor's deposit account). Both of these remedies are pursuant to a creditor's underlying monetary claim, not in aid of its security interest.

Smyth contended that the City waived its security interest in the Debtor's Real Property despite the fact that the Writ covered the Debtor's Business Personal Property, which was already the City's collateral. In support of this contention, he cited In re Buchanan, 303 B.R. 199, 200-01 (Bankr. N.D. Cal. 2003). In Buchanan, a bankruptcy court held that a creditor violated the one action rule and thus lost its security interest in real property by obtaining an pre-judgment attachment lien on its real property collateral. Smyth contended that the Writ should be viewed as a pre-judgment writ of attachment because the State Court Complaint did not include a claim for judicial foreclosure on the Debtor's Business Personal Property. This contention is frivolous.

As discussed above, the State Court Complaint did include a claim for possession of the Debtor's Business Personal Property. A writ of possession may only be issued to a party with a right of possession: i.e., typically, a secured creditor or lessor. See Cal. Civ. Proc. Code § 512.010(b)(1). By contrast, a writ of attachment can only be issued to an unsecured creditor. See Cal. Civ. Proc.

Code § 483.010(b). It is frivolous to contend that a writ of possession is comparable to a writ of attachment for one action rule purposes. Moreover, the argument and claim is doubly frivolous because the Bankruptcy Court Complaint did not even allege that the Writ had been either issued or enforced.

3. Were Claims Asserted For An Improper Purpose?

As noted above, the City also seeks sanctions under Rule 9011(b)(1) based on the theory that the Bankruptcy Court Complaint was filed for an improper purpose. The resolution of this issue is critical to the Debtor as sanctions may only be imposed on him personally on this ground. The City contended that the Debtor's improper purpose is established by the fact that the claims asserted in the Bankruptcy Court Complaint are virtually identical to the claims asserted in the State Court Cross-Complaint. Moreover, according to the City, the frivolous filings in the main case should also be taken into account in determining the Debtor's purpose in filing the Bankruptcy Court Complaint.

Smyth offered several arguments as to why sanctions should not be imposed on either him or the Debtor on this basis. He contended first that, to impose sanctions on this basis, the Court must find that *none* of the claims asserted in the Bankruptcy Court Complaint have merit. In support of this proposition, Smyth cited Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986). This contention is in error. It is well established in the Ninth Circuit that Rule 11(b)(1) sanctions may be imposed even if fewer than all of the claims asserted in a complaint are frivolous. See Townsend

v. Holman Consulting Corp., 929 F.2d 1358, 1363-1365 (9th Cir. 1991)(en banc). To the contrary, Zaldivar holds that Rule 11(b)(1) sanctions may not be imposed if *all* of the claims asserted are nonfrivolous. Zaldivar, 780 F.2d at 832.[8]

Next, Smyth contended that, because the Plan stated that the Debtor would pay all his debts to the City by April 1, 2004, he needed to file the Bankruptcy Court Complaint so as to determine the amount owed to the City. Smyth claimed that the Debtor had never received a complete accounting and questioned the City's calculation of interest and penalties. He argued that these issues are ordinary defenses and arguments for recoupment, citing In re Dayton Seaside Associates No. 2, L.P., 257 B.R. 123, 133 (Bankr. S.D. N.Y. 2000) and In re Crisomia, 2002 WL 31202722 (Bank. E.D. Pa. 2002).[9] He contended that it would be unreasonable for confirmation of the Plan

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[8]Zaldivar has some similarity to the instant case. In that case, supporters of a city councilman against whom a recall action was being mounted, after failing to stop the recall through a state court proceeding, filed an action in federal court. After dismissing the action, the district court imposed sanctions against the plaintiffs as both frivolous and filed for an improper purpose. The Zaldivar court noted that the state court had already rejected the issue raised in the federal district court action, stating that, "without question," successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11." Zaldivar, 780 F.2d at 832.

[9]Dayton Seaside and Crismonia are distinguishable. They merely held that claims barred by the statute of limitations can be asserted as affirmative defenses to a creditor's claim for offset purposes. Moreover, the Dayton Seaside court specifically noted that the bankruptcy claims process was not being used as a means of relitigating issues that had already been determined in an earlier proceeding. Dayton Seaside, 275 B.R. at 134. Similarly, in Crisomia, there was no suggestion that the claims in question had been previously litigated to final judgment. Crismonia at *4-*5.

to bar him from challenging the amount of the City's Proof of Claim when the City had not even filed its proof of claim when the Plan was confirmed.

The Court agrees that the Debtor has a right to challenge the amount of the City's Proof of Claim notwithstanding confirmation of the Plan. However, it was not necessary for Smyth to file an adversary proceeding to do so. An objection to claim would have been sufficient. Moreover, the challenge to the claim may only raise matters in recoupment of the City's claim, such as the calculation of the amount of the claim itself. It may not raise any claims or defenses that are barred by collateral estoppel or res judicata.[10]

As discussed above, the claims or defenses presented must be frivolous to have been filed for an improper purpose under Rule 9011(b)(1). Logically, this separate basis for sanctions would make no sense if it provided an independent basis for sanctions whenever frivolous claims were filed. However, if an objective standard is applied to an attorney, this is the inevitable result. The Court

[10]Attached to the City's Proof of Claim are three letters from the City dated November 19, 2003 addressed to a title company, providing a breakdown of the City's claims. The interest figure looks unremarkable given the period of time over which interest accrued. However, the large amounts specified for the late charges do require some explanation. The doctrines of res judicata and collateral estoppel do not prevent the Debtor from requiring this explanation and from receiving an appropriate reduction if the late charges are excessive. Similarly, if the amounts secured by the Interim Loan Liens have been repaid and the City is unwilling to release them voluntarily, the Debtor may seek judicial assistance to compel their release.

cannot conceive of a proper motive for a reasonable attorney to file a frivolous claim or defense.

A different standard applies to the Debtor: i.e., that of a reasonable nonattorney. Moreover, in a sense, the Debtor, represented by Smyth, is in a worse position than an unrepresented party since he presumably relied on Smyth's assurances that the Bankruptcy Court Complaint could be legitimately filed. As stated above, the Court concludes that, under these circumstances, a reasonable nonattorney might have relied on these assurances, particularly since there had never been a trial on his claims. However, by this Memorandum, the Court puts the Debtor on notice that all of his claims attempting to have the Deeds of Trust or Interim Loan Liens invalidated or to have his debt to the City declared extinguished are barred as a result of his prior litigation efforts. He may not plead ignorance if he attempts to relitigate them another time.

4. Appropriate Sanctions

The only thing remaining is to determine an appropriate sanction to be imposed on Smyth. As noted above, the City requested that Smyth be required to pay his attorneys' fees and costs incurred in connection with the Adversary Proceeding. The total of these fees and costs is $10,671. Smyth contended that this amount was excessive. The Court disagrees.

This is not the first time Smyth has been sanctioned. As he conceded in his papers, many years ago, he was the object of a malpractice judgment. Thereafter, over ten years ago, the three

bankruptcy judges in the Oakland division, based on their observations of his incompetence and unprofessional conduct, advised Smyth that he would not be appointed to represent chapter 11 debtors.

Still more recently, in In re Kellander, Case No. 99-17645, Smyth was sanctioned $6,000 for filing a frivolous motion to avoid a judgment lien for child support despite the statutory exclusion of such liens from avoidance. The sanction was imposed by the Honorable James Grube of the San Jose division, after the judge assigned to the case, the Honorable Randall Newsome, recused himself. Judge Grube also required Smyth to complete 40 hours of continuing legal education in the field of consumer bankruptcy law and legal ethics.[11] Judge Grube's decision was affirmed by the Bankruptcy Appellate Panel and by the Ninth Circuit. See In re Kellander, 2001 WL 599229 (9th Cir.).

Clearly, Judge Grube's sanction was insufficient to deter Smyth's continued unprofessional conduct. Thus, it is not excessive to impose a monetary sanction of $10,671 for his conduct in connection with the Adversary Proceeding. While Rule 9011(b) is not intended as a justification for "wholesale fee shifting," requiring the offending attorney to pay the attorneys' fees of the party harmed is permissible under appropriate circumstances. The Court finds the circumstances here to be appropriate and that this amount is the

[11]Because Judge Grube's order was not published, a copy of the order is attached to the Main Case Memorandum, issued herewith. The order provides a history of Smyth's prior misconduct and vividly illustrates some of Smyth's deficiencies.

least that would serve the deterrence purpose of the rule. See Zambrano v. City of Tustin, 885 F.2d 1473, 1480 (9th Cir. 1989).

The Court's concern is that this sanction is inadequate. The Court will not impose a further continuing educational requirement, the prior course of study having done Smyth little or no good. However, the Court is mindful of the additional sanction imposed in connection with its own order to show cause: i.e., a six month suspension from practice before the bankruptcy courts of this district. See Doering v. Union County Bd. Of Chosen Freeholders, 857 F.2d 191, 194 (7th Cir. 1988)(enumerating possible types of monetary sanctions).

The Court is hopeful that the combination of the two forms of sanction will have a sufficient deterrence effect. Because the suspension is likely to have an effect on Smyth's ability to pay the monetary sanction, Smyth will not be required to pay the monetary sanction until one year from effective date of the order imposing the sanction.

CONCLUSION

The Court concludes that the claims asserted in the Bankruptcy Court Complaint are frivolous, and Smyth filed them for an improper purpose, judged from an objective standpoint. The Court concludes that the monetary sanction requested by the City is appropriate but will defer Smyth's obligation to pay this amount to the City until one year after the effective date of the order being issued in the main case, suspending Smyth from practice before the bankruptcy courts of this district for six months. The Court concludes that the

Debtor did not file the Bankruptcy Court Complaint for an improper purpose. However, the Debtor is now given clear notice that any further attempt to relitigate these claims would be for an improper purpose.

Dated: September 1, 2004

_____
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

PROOF OF SERVICE

I, the undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Northern District of California at Oakland, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document by depositing it in the regular United States mail at Oakland, California, on the date shown below, in a sealed envelope bearing the lawful frank of the Bankruptcy Court, addressed as listed below.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: September ___, 2004

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